Response to Independent Review of IP and Growth

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Introduction

This submission is made to the Response to the Independent Review of IP and Growth. It argues for consideration to be given to a new form of providing access to important sets of data by the introduction of open and standard forms of fees, on a fair, reasonable and non discriminatory basis. This would be based on the importance of the information, rather than the existing relationships between IP and competition, and the scope of, and limits and exceptions to, copyright database rights. *A contribution is made, therefore to Copyright questions Copyright 5 and 7 and to IP and Competition*……

The power of IP

There is potential for copyright (and database rights) to exist in respect of important datasets – eg maps, telephone directories, encyclopaedias. In the offline world, this was not a significant issue, as the rights related to the expression of the idea (this map), not the principle itself (the actual locations). One could consult a different map, book, or information source. Nonetheless, court cases have been raised about the power held by owners of IP in relation to information sets and the competition issues which may result, eg *HMSO v AA*[1] and *Magill*.[2] The unclear results of these cases are considered further below.

On the online world, there may be fewer options, and more power held by the IP owners. Key industries where this could be problematic are information and health databases and

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[1] *HM Stationery Office v Automobile Association Ltd* [2001] E.C.C. 34

[2] *Radio Telefis Eireann v Commission of the European Communities* (C-241/91 P) [1995] E.C.R. I-743

geospatial data. The latter is being investigated as part of a research project of one of the authors of this paper**, "**Obtaining, protecting and using essential environmental technologies: a holistic analysis" which is funded by the British Academy.[3]

For example, one provider of map information online might become the most preferred provider, perhaps because of its quality of service, its low fees or free service, or the fact that it is provided under a well known brand. This means that other existing or potential providers of this information may choose to no longer operate. Other businesses may develop products which are interoperable with those of the known provider, which will increase the power of that provider. Other products which could be provided (say by students being sent to map terrain again) may not come about if businesses consider/fear that consumers will wish to work with the known provider.

One could argue that this is unlikely to occur, given the development of new online businesses and the willingness of consumers to make their own choices, using information obtained from a search engine results. But search engines and their results are not themselves a neutral truth, but the provision of a product by one provider; who guards the guards?[4]

The impact of IP

The incumbent owner of IP may therefore control data and the use of it. This could have an impact in relation to derivative and transformative works based on the data, businesses which could be based on interaction with the data, research which could be carried out in relation to it, and decisions made as to future funding and treatment of disease, or government targets in respect of climate change.

The copyright and database regimes have exceptions; but they are not clear. The rights themselves are not clear, as is evidenced in ongoing litigation.[5] Litigation is a fact of life. But it is not always a good thing when it involves information which is important for society.

The role of the IP/competition interface

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[3] http://www.law.ed.ac.uk/essentialtechnologies/

[4] See more details in Brown, A.E.L. "Intellectual Property, Competition and the Internet" 417, Waelde, C. "Search Engines and Copyright: Shaping Information Markets" 227 and Bednarz, T. and Waelde, C. "Search Engines, Keyword Advertising and Trade Marks: Fair Innovation or Free Riding" 267, all in Edwards, L. and Waelde, C. *Law and the Internet* Hart, 2009

[5] See eg *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-6569 *and British Horseracing Board Ltd v William Hill Organisation Ltd* (C-203/02) [2004] E.C.R. I-10415

As noted above, competition law can be relevant. These data sets could be licensed by the IP owners. But there is a question as to whether or not the IP owner may wish to do so.

It is now well established, although still controversial, that it can be an abuse of a dominant position, within what is now article 102 TFEU, to refuse to licence an IP right. But the circumstances as to when this will be so are unclear – they must be exceptional[6] and likely involve a new product or technical development.[7] This may be met by derivative or transformative works; but they would not be met by requests for wider access to data for use in evaluating climate change and how best to respond to it by encouraging less use of heating or cycling - effective, but not technical.

Further, for there to be a role for competition in the first place, a regulator must choose to investigate a refusal to licence (as the European Commission did, say, in relation to Microsoft).[8] The alternative, which is less likely, is for a court to explore a Euro-defence if the incumbent provider should bring an infringement action against someone who obtains and then seeks to use the information.[9]

If the question of abuse and IP is considered, the next question is market definition; only then do questions of dominance and abuse arise. The tools to be adopted by decision makers are clear. [10] Yet case law from a breadth of areas makes it clear that market definition is a complex exercise and one which gives rise to deep divisions. [11]

From a scholarly level and from the perspective of individual disputes, the relationship between IP and competition may be clear or at least understandable. From a practical level, however, the application of it requires a high level of legal and economic sophistication which will be beyond the time and resources of most individuals, businesses and policy makers from other areas.

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[6] *Volvo AB v Erik Veng (UK) Ltd* (238/87) [1988] E.C.R. 6211, *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C418/01) [2004] E.C.R. I-5039

[7] *Microsoft Corp v Commission of the European Communities* (T-201/04) [2007] 5 C.M.L.R. 11

[8] *Microsoft* Case COMP/C-3/37, available via http://www.microsoft.com/presspass/download/legal/europeancommission/03-24-06EUDecision.pdf

[9] *Intel Corp v VIA Technologies Inc* [2002] EWCA Civ 1905 [2003] F.S.R. 33

[10] In the EU, see Commission Notice on the definition of the relevant market for the purposes of Community competition law O.J. C 372/03 9.12.1997 "Commission Market Definition Notice"; in the UK, OFT (2004) *Market Definition Understanding Competition Law* 403 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft403.pdf

[11] See eg *Microsoft* Case COMP/C-3/37, available via http://www.microsoft.com/presspass/download/legal/europeancommission/03-24-06EUDecision.pdf and discussion in Art, J.V. and McCurdy, G.v.S "The European Commission's media player remedy in its Microsoft decision: compulsory code removal despite the absence of tying or foreclosure". ELCR 2004 25(11) 694-707

An avenue of enquiry

It would be worthwhile considering whether or not a new approach should be taken to the sharing of important information. This could be based not on the legal principles of IP and competition but on the objective of bringing about greater access. [12]

The starting point could be legislation requiring that all sets of health and environmental information which relate to the UK should be open to applications for access by all. This should be available on standard terms, on a fair, reasonable and non discriminatory to all who ask. This should be so even if the information is not developed using public money.

This proposal draws from and would be consistent with the remedies imposes in *IMS* and in *Microsoft*, discussed above, from older access cases involving facilities such as ports and railways,[13] the collecting society arrangements, which are also the subject of this consultation, from WTO instruments confirming that compulsory licensing to deal with a national emergency can be consistent with obligations under TRIPS[14] and calls for more open software standards in the UK public sector.[15]

This proposal could be argued to be inconsistent with the reward of innovation and creativity and will deter investors in business. But there will be scope for some reward. And businesses and funders will seek reward elsewhere. Are some things too important to be left to the market? A point worth pursuing.

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[12] This proposal draws from discussion in a Joint Working Paper , Brown et al Towards a holistic approach to technology and climate change:what would form part of an answer?" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697608 and provisional proposals made by Dr Abbe Brown as the next phase of the project moves forward http://www.law.ed.ac.uk/essentialtechnologies/files/Abbe%20Brown%20December%202010.pdf

[13] See eg *Sea Containers v. Stena Sealink* [1994] O.J. L15/8

[14] Declaration on the TRIPs agreement and Public Health" DOHA WTO MINISTERIAL 2001: TRIPs. Adopted on 14 November 2001. WT/MIN(01)/DEC/2 20 November 2001 available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

[15] See Cabinet Office "Open Source, Open Standards and Re-use – Government Action Plan", (January 2010) http://www.cabinetoffice.gov.uk/resource-library/open-source-open-standards-and-re-use-government-action-plan